United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2431

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CIVIL AERONAUTICS BOARD,

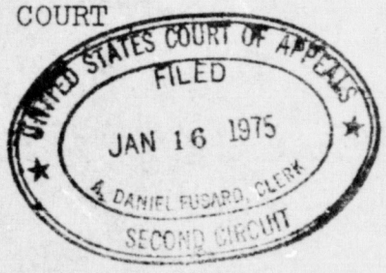
Plaintiff-Appellee,

v.

CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS; SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY: ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR PLAINTIFF-APPELLEE

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in issuing a preliminary injunction to prevent serious and pervasive violations of the Federal Aviation Act of 1958, 49 U.S.C. 1301-1542 (1970) and regulations promulgated thereunder by the Civil Aeronautics Board.

requested a report by July 29, 1974 (C.A. 1). However, at

2. Whether there were procedural errors committed below which would warrant nullification of the preliminary injunction.

STATEMENT

The Civil Aeronautics Board ["Board" or "CAB"] commenced this suit on June 19, 1974 under 49 U.S.C. 1487(a) to enjoin preliminarily and permanently certain travel business entities and their operators, including defendants-appellants, from participating in the "'vast black market in air transportation'" involving "affinity" charter flights which it brought to this Court's attention in Civil Aeronautics Board v. Aeromatic Travel Corp., 489 F. 2d 251, 252 (C.A. 2, 1974). In its complaint, which was supported by numerous exhibits and affidavits, the Board charged, inter alia, that the travel companies were violating 49 U.S.C. 1371(a) by acting as indirect air carriers without having obtained from the Board a certificate of public convenience and necessity, and that they were violating their duty under 49 U.S.C. 1485(e) to comply with Board regulations applicable to affinity charter flights, 14 C.F.R. Parts 207 and 208 (1974).

During the course of the proceedings below consent injunctions were granted against six corporate and eight individual defendants. After extensive evidentiary hearings before a United States Magistrate, the district court made findings of

fact and conclusions of law, and on October 9, 1974 entered a preliminary injunction against the remaining eight corporate and eleven individual defendants. The injunction was amended on October 15, 1974, and from this amended preliminary injunction four corporate and five individual defendants have appealed.

1. The Applicable Statutes and Regulations.

The Federal Aviation Act of 1958 [the "Act"] authorizes the Board to "perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure . . . as it shall deem necessary to carry out the provisions of" the Act. 49 U.S.C. 1324(a). It is the "duty" of "every person" subject to the Act, as well as "its agents and employees", to comply with the orders, rules, and regulations of the Board affecting such person "so long as the same shall remain in effect." 49 U.S.C. 1485(e). The Board is authorized to apply in federal district court for injunctive and other relief to enforce obedience to its orders, rules, and regulations and to restrain "any person", as well as his "officers, agents, employees, and representatives", from violating any provision of the Act. 49 U.S.C. 1487(a). Violators of the Act and the orders, rules, and regulations promulgated thereunder may be liable for civil and criminal sanctions. 49 U.S.C. 1471, 1472.

An "air carrier" is defined under the Act as "any citizen of the United States who undertakes, whether directly or by a lease or any other arrangement, to engage in air transportation", 49 U.S.C. 1301(3). No air carrier may engage in air transportation without first obtaining from the Board a certificate of public convenience and necessity, 49 U.S.C. 1371(a), unless specifically exempted from this requirement by the Board. 49 U.S.C. 1301(3), 1386(b)(1). A "supplemental air carrier" is an "air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation" ("charter trips"). 49 U.S.C. 1301(33), (34).

The Act distinguishes between scheduled, individually ticketed air transportation offered to the general public, and charter ("supplemental") air transportation. 49 U.S.C. 1301(10), (34). Only trunkline air carriers, possessing a certificate of public convenience and necessity, may provide individually ticketed air transportation. 49 U.S.C. 1301(10), (34), 1374(a)(1). Either trunkline air carriers or supplemental air carriers may offer charter transportation. 49 U.S.C. 1371(d)(3), (6). Recently the District of Columbia Circuit read the language and legislative history of the Act as manifesting a "congressional" intent" that the Board "should never permit 'individually ticketed service to be offered to the general public under the guise of charter'".[1/]

1/ Saturn Airways, Inc. v. Civil Aeronautics Board, 483 F. 2d 1284, 1288 (C.A.D.C., 1973).

The court further concluded that the public interest

Pursuant to its statutorily conferred powers, the Board has promulgated extensive regulations applicable to different types of charter flights.[2] This suit involves "pro rata" charter flights, which are known in the trade as "affinity" charters.[3] Essentially, an affinity charter involves a flight by members of an organization, club, or other such group[4] having some community of interest apart from a desire to participate in the charter, who engage an aircraft to be paid for on a pro rata basis by the travelling members.[5]

The regulations applicable to affinity charters contemplate that there shall be no more than two parties to a contract for an affinity charter flight. 14 C.F.R. 207.4a. One party

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2/ A useful review of some of the legitimate types of charter flights authorized by the Board is given in Saturn Airways, Inc. v. Civil Aeronautics Board, supra, at 1286-1291.

3/ The regulations applicable to domestic affinity charters are set forth in 14 C.F.R. Parts 207 and 208. Those on trunkline air carriers are governed by Part 207, while those on supplemental air carriers are governed by Part 208. Since these regulations are basically similar in all pertinent respects, only the relevant portions of Part 207 will be discussed in this brief.

4/ The "spouse, dependent children, and parents" of a member of a chartering group who live in the member's household may also participate in a charter flight. 14 C.F.R. 207.42.

5/ 14 C.F.R. 207.11(b)(2), 207.40(b), 207.41, 207.43. The pro rata requirement applies whether the aircraft has been chartered by (a) one chartering organization or (b) more than one chartering organization, each of which purchases at least 40 seats. See 14 C.F.R. 207.11(b)(2), (c).

is the carrier who holds a certificate of public convenience and necessity issued by the Board. See 14 C.F.R. 207.21 - 207.26 ("REQUIREMENTS RELATING TO AIR CARRIERS"). The other party is the chartering organization. See 14 C.F.R. 207.40 - 207.47 ("REQUIREMENTS RELATING TO CHARTERING ORGANIZATIONS"). The regulations also contemplate that a third party, who is not a party to the charter contract, may assist the contracting parties in arranging the charter flight. This third party is the "travel agent" who is defined as "any person engaged in the formation of groups for transportation or in the solicitation or sale of transportation services." 14 C.F.R. 207.1. See 14 C.F.R. 207.30 207.31 ("REQUIREMENTS RELATING TO TRAVEL AGENTS"). A travel agent may receive a commission from the carrier, usually 5% of the total charter cost (14 C.F.R. 207.23), but he may not receive a second commission from the chartering organization for the same service (14 C.F.R. 207.30). The regulations applicable to affinity charters do not allow for the involvement of anyone whose function may be described as a "wholesaler" or "tour operator" of affinity air transportation. 6/

6/ The regulations applicable to other types of charters, "travel group charters" and "inclusive tour charters", do contemplate the involvement of "charter organizers" or "tour operators" in charter flights. See 14 C.F.R. Parts 372a and 378 (1974). The role of the charter organizer is described in Saturn Airways, Inc. v. Civil Aeronautics Board, 483 F. 2d at 1293. Pursuant to 49 U.S.C. 1301(3), 1386(b)(1), the Board has exempted these charter organizers and tour operators from the requirement of obtaining a certificate of public convenience and necessity. 14 C.F.R. 372.20, 378.3. However, the Board has imposed extensive regulatory requirements upon their operations. See 14 C.F.R. Parts 372a and 378.

The regulations contain detailed provisions which impose limitations upon the manner in which affinity charter flights may be arranged and requirements that the arrangements be sufficiently documented so that those limitations will not be transgressed. The regulations prohibit, inter alia, the following: the engagement of an aircraft by a group agent "whose business is the formation of groups . . . or the solicitation or sale of transportation services";[7] the "solicitation of individuals (through personal contact, advertising, or otherwise) as distinguished from the solicitation of an organization for a charter trip";[8] the formation of a chartering group "by means of a solicitation of the general public";[9] and the participation in charter flights of members of a chartering group who "joined the organization merely to participate in the charter as the result of solicitation of the general public" or who have not been "members for a minimum of 6 months prior to the starting flight date".[10] Prior to the performance of a

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7/ 14 C.F.R. 207.11(b)(2).

8/ 14 C.F.R. 207.21(a).

9/ 14 C.F.R. 207.40(b).

10/ Id.

charter flight the carrier, charterer, and travel agent (if any) must execute a "Statement of Supporting Information" in which they must name any "intermediary" involved in its arrangement, describe the charter in detail, and warrant their compliance with the applicable Board regulations.[11/]

2. The Facts

The facts are largely undisputed. For the sake of brevity, we shall review only the activities of appellants, essentially as found by the district court.

a. Carefree Travel, Inc., Vacation Ventures, Inc., and Doran Jacobs

Carefree Travel, Inc. and Vacation Ventures, Inc. are affiliated subsidiary New York business corporations, wholly owned by Imperial World Wide Group Tours, Inc., a New York business corporation (J.A. 43; Affidavit of Doran Jacobs No. 1, p. 1; Add. 33a[12/]). Doran Jacobs, a vice-president of both subsidiaries and a stockholder in the parent, acts on behalf of the two companies with respect to affinity charters and uses them interchangeably (Id.). He describes Carefree/Vacation Ventures as a "wholesale tour operator" dealing in affinity air transportation (Jacobs Aff. No. 1, p. 2; Add. 34a).

11/ 14 C.F.R. 207.24, 207.31, 207.47, and "Statement of Supporting Information" at the end of Part 207.

12/ Due to the accelerated nature of this appeal we consented to appellants' request that only an abridged Joint Appendix be printed. We have reproduced in a separately bound Addendum ["Add."] to this brief certain portions of the record not included in that appendix, for the convenience of the Court.

On May 9, 1974 Vacation Ventures contracted directly with Overseas National Airways for the reservation of aircraft capacity between New York and Las Vegas weekly on Thursdays and Sunday commencing May 19, 1974 and terminating December 29, 1974 (J.A. 43-44). The charter price was set at $22,375, subject to a 10% increase to reflect possible additional fuel costs, and Vacation Ventures agreed to pay Overseas $25,000 as a "deposit" (CAB Post-Hearing Exhibit No. 15; Add.67a). Vacation Ventures agreed to reimburse Overseas for "ferry mileage" (the positioning of empty aircraft) if any flight were cancelled within 45 days of its scheduled departure, and to pay $500 per leg if two successive legs were cancelled on the same day (J.A. 43-44). Carefree/Vacation subsequently prepared advertising flyers describing its "Las Vegas Program" of roundtrip flights combined with hotel, dining, and entertainment arrangements ("Swingin' Vegas Availability Sheet", CAB Post-Hearing Exhibit No. 16; Add. 71a), and it circulated them to a large number of travel agents (J.A. 44). According to Doran Jacobs, the expected airline revenue from these package charters to Las Vegas and other locations from July, 1974 through December, 1974 was approximately $7.3 million, and the expected hotel revenue $4.5 million (Jacobs Aff. No. 1, p. 3; Add. 35a).

Liberty Travel Service, Inc., a large retail travel agency with 34 offices in New York, Connecticut, New Jersey, and Pennsylvania, was one of the travel agencies which received advertising materials from Carefree/Vacation Ventures (J.A. 44). A branch manager of Liberty Travel testified that if a walk-in customer requested cheap air travel to one of the locations mentioned in the advertising materials, his agency would reserve space for the customer through Carefree/Vacation Ventures on one of the charter packages, and there would be no requirement that the customer belong to an affinity group (J.A. 44-45.)[13/] Carefree/Vacation Ventures would then forward to Liberty Travel a packet of travel documents for the customer, including a membership card in some organization for the customer and a boarding pass for the aircraft (J.A. 45). The price for these charter flights was fixed by Carefree/Vacation Ventures and was not based on a pro rata share of the charter cost (Id.) (See Exhibit 16 to Affidavit of Bernard B. Burns; Add. 53a).

Investigation by the Board disclosed that Carefree/Vacation Ventures itself provides air transportation services to individual members of the general public on what purport to be affinity charter flights by direct sale from its offices, which are readily accessible to such customers, and the

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13/ On July 18, 1974 the district court granted immunity from prosecution to the Liberty Travel personnel who testified below (J.A. 33).

customers need not be bona fide members of their flight's chartering organization to gain passage (J.A. 16-17, 43). On April 10, 1974 Carefree/Vacation Ventures sold George S. Minichiello, a roundtrip flight to Las Vegas for May 2 - May 5, 1974. The price was $36.25 more than the pro rata share of the total charter cost (Supplemental Affidavit of George S. Minichiello, pp. 11-12, and Exhibit 12 thereto; Add. 50a-52a). Approximately ten days before the flight Mr. Minichiello received, in a Carefree envelope, a "Tour Membership Card" entitled "Swingin' Vegas" made out to his name, together with "Air Only" baggage tags and notification of the flight dates and times on Capitol Airlines (J.A. 15-16); Affidavit of George S. Minichiello, p. 11, and Exhibit 29 thereto; Add.44a,46a-48a). Subsequently, Mr. Minichiello learned that the name of the chartering organization for his flight was "Willowood Rifle and Pistol Club" (Minichiello Supp. Aff., pp. 11-12, and Exhibit 12 thereto; Add. 50a-52a). When Minichiello checked in at Capitol Airlines he was given a passenger boarding pass and his name appeared on the passenger manifest (J.A. 16; Minichiello Aff., pp. 11-12, and Exhibit 30 thereto; Add.44a-45a,49a). Mr. Minichiello is a special agent for the Board, although, of course, he did not identify himself as such in his dealings with Carefree/Vacation Ventures (Minichiello Aff., pp. 1, 11; Add. 43a, 44a).

b. Ernie Pike Associates, Ltd, Surrey International Travel, Inc., Ernie Pike, Henry Zetlin, Esther Zetlin, and Jack Gorcey

Ernie Pike Associates, Ltd. is described by its president, Ernie Pike, as a "wholesale tour operator" (Affidavit of Ernie Pike No. 1, p. 1; Add. 39a) which coordinates affinity charter flights with hotel reservations, bus tours, meals, sightseeing, and recreational activities (J.A. 50). Henry Zetlin runs Pike on a day-to-day basis (Testimony of Ernie Pike, p. 14; Add. 55a). Because Pike is not an authorized travel agent and cannot issue airline tickets on behalf of carriers for a commission, its uniform practice is to have an authorized travel agency, primarily Surrey International Travel, Inc., reserve the entire capacity of an aircraft in advance of the flight date, and to coordinate the flight with land arrangements to which it commits itself in advance (J.A. 51; Pike Test.,pp. 102, 104-105, Pike Aff. No. 1, pp. 1-2; Add.63a, 65a-66a, 39a-40a). Pike secures the reserved space by paying the charter price of the aircraft to Surrey in advance (Pike Test., pp. 101-105; Add. 62a-66a). Esther Zetlin, the wife of Henry Zetlin, is president of Surrey, and Jack Gorcey is a director and employee (Affidavit of Esther Zetlin No. 1, p. 1; Add. 38a).

Pike established itself in the Las Vegas and Hawaii affinity charter markets by sending advertising flyers and other solicitation materials to retail travel agencies describing

its affinity charter packages (Pike Test., pp. 65-66, Pike Aff. No. 1, pp. 2-3; Add.58a-59a, 40a-41a). When a travel agency calls Pike to purchase one of these packages for a customer, Pike quotes a price fixed by it for the package (Pike Test., pp. 65-66; Add.58a-59a). This price includes a commission for the agency also fixed by Pike (Pike Test., pp. 36-37; Add.56a-57a). Pike "presume[s]" that the customers on whose behalf the travel agencies purchase the affinity charter package are members of bona fide chartering organizations, but it does not restrict its sales to minimum lots of 40 packages[14] and will sell individual packages in any number (Pike Test., pp. 92-93; Add.60a-61a; J.A. 51). During a recent airline strike at Trans World Airlines, Pike assumed responsibility for arranging alternate transportation for customers who bought its packages using that carrier (J.A. 51).

Surrey, as travel agent of record for many of the charter packages put together by Pike, frequently executes the required "Statement of Supporting Information" on the basis of information supplied by Pike, and itself rarely knows the chartering organization (J.A. 52). In none of these "Statements" has Surrey identified, or referred to the involvement of, Pike (Id.). In response to "Question 12" on the "Statement" requiring identification of "any intermediary involved in the charter", Surrey answers: "None" (Id.).

14/ Under the affinity charter regulations the minimum number of seats a chartering organization may purchase on a charter flight is 40. See 14 C.F.R. 207.11(b)(2), (c).

For an affinity charter flight in early 1974 Pike and Surrey submitted to Trans World Airlines, the carrier of record, a charter contract ostensibly signed by "Jack Hausberg" on behalf of the Knights of Pythias (J.A. 18). Investigation revealed that the Pythians had nothing to do with this charter and did not have a member named "Jack Hausberg" (Id.). While employed at Pike, Rita M. Collins executed charter documents and passenger manifests evidencing the membership of passengers on affinity charter packages put together by Pike in bogus charter organizations (J.A. 17-18).

3. The Proceedings Below

The Board commenced this suit on June 19, 1974 and moved the same day for a preliminary injunction by order to show cause (J.A. 30). In accordance with Rule 1 of the district court's Individual Assignment and Calendar Rules the Board described its suit as related to Civil Aeronautics Board v. Aeromatic Travel Corp., 349 F. Supp. 1151 (E.D.N.Y. 1972), reversed, 489 F. 2d 251 (C.A. 2, 1974), which was pending at the time before Judge Orrin Judd of that court to whom it had been randomly assigned (Id.). As a result of the related nature of the cases this suit, too, was assigned to Judge Judd. Judge Judd fixed June 28, 1974 as the hearing date for the Board's motion, July 5 as the hearing date for various motions to dismiss contemplated by defendants, and July 12 for testimony of defendants' witnesses (J.A. 30-31).

On June 28 the Board submitted a default judgment against two of the defendants (J.A. 31). On July 5 the district court denied defendants' motions (1) to dismiss the complaint or to sever for prejudicial misjoinder, (2) to add unnamed airlines as indispensable parties, (3) for a jury trial, (4) to reassign the case to another judge, and (5) to certify the denial of these motions to this Court for interlocutory review (J.A. 31-32). That same day the court heard the direct testimony of CAB Special Agent George S. Minichiello, accepted as direct testimony his affidavit, and permitted some cross-examination (J.A. 32). At defendants' request the hearing was adjourned to July 19, 1974 (Id.).

On July 18, 1974 the district court granted immunity from prosecution to two witnesses being deposed by the Board who were principals of Liberty Travel Service, Inc. (J.A. 33).

On July 19, 1974 consent injunctions were entered against certain of the defendants, motions of the remaining defendants for partial summary judgment were denied, and further cross-examination of Special Agent Minichiello was heard (J.A. 33). At the conclusion of the hearing the district court assigned the case to United States Magistrate Vincent A. Catoggio to hear and report as special master, over the objections of the Board (J.A. 33, 63).[15/] Initially the order of reference

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15/ Although some of the defendants also objected to the reference to the Magistrate none of the appellants did.

requested a report by July 29, 1974 (J.A. 1). However, at the request of defendants and over the vigorous objections of the Board, the district court extended the times fixed in the order and allowed the parties until September 3, 1974 to file exceptions to the report (J.A. 34).

Extensive evidentiary hearings were held before the Magistrate, and the report was filed on August 27, 1974 (J.A. 34). In the report the Magistrate found that "ample reason exists to suspect that flagrant and wide spread violations of the law designed to protect the American public have been committed in the recent past by 'package tour companies'" and that "[a]ll of the surviving defendants with the possible exception of Snow and Kurtz, have been guilty at one time or another of serious violations of CAB rules, regulations and statute laws" (J.A. 13, 18). However, the Magistrate did not recommend in favor of the issuance of preliminary injunctive relief because he believed there had not been "adequate proof" of systematic violation (J.A. 19).

On September 30, 1974 the district court filed a "Memorandum of Decision" (J.A. 27-84) in which it announced that it "will confirm the Magistrate's major findings of fact, but not his conclusions of law, and will grant an injunction against certain of the defendants, but with provisions less drastic than those requested by the C.A.B." (J.A. 29).

With respect to the findings of the Magistrate, the court pointed out that:

> The time schedule which the court set for the Magistrate to submit his report was insufficient to permit him to analyze the evidence other than individual sales to Mr. Minichiello by various defendants. The Magistrate found that most of the defendants had violated the regulations, but that the violations were not proved to be so systematic as to justify an injunction. Evidence on which he did not pass showed systematic violations, however.
>
> The evidence of certain general business practices of the defendants was largely undisputed, a situation basically similar to that described by the Court of Appeals in the Aeromatic case. Much of the evidence consists of documents and of testimony of the defendants' officers and employees. It is basically a legal question whether the facts regarding the defendants' operations make them subject to the Board's power to regulate air carriers. The court may therefore read its own conclusions from the evidence. C.A.B. v. Aeromatic Travel Corp., supra, 489 F.2d 251, 254 (2d Cir. 1974).

With respect to the appellants, the court reached the following conclusions concerning their illegal affinity charter activities (J.A. 68-69, 71):

> Carefree has offered air transportation for sale after contracting for it with O.N.A. It has sold air transportation to affinity chapter groups and to individual members of the general public and has issued circulars which facilitated the illegal individual sales of passage on affinity charter flights to persons who had not been members of the chartering organizations for six months. Carefree made no provision for pro-rating the

charter cost among passengers in its published circulars. Therefore it was directly undertaking to engage in air transportation "by a lease or any other arrangement" in violation of 29 U.S.C. § 1301(3), and was aiding in potential violation of the affinity charter regulations.

The Gil-Pike-Surrey group involves a division of responsibility, which encourages widespread violation of the affinity charter restrictions. Gil is an agent or representative of Pike under 49 U.S.C. § 1487(a), and both of them are intermediaries between Surrey and the chartering organizations. All three should bear some responsibility for the false warranties by charterers (e.g. Exs. 5, 8, 9, and 10 to Paul W. Wallig's affidavit of June 4, 1974) that there was no intermediary between Surrey and the chartering organization.

The court further concluded that the public interest factors, which it listed as (a) requiring obedience to the statute and regulations in order to ensure the financial solvency of the direct air carriers on which the general public depends for regular air transportation, (b) making available to the public low-cost air transportation and maintaining the affinity charter revenues that are also important to all direct air carriers, and (c) ensuring that passengers are not stranded abroad or that they are not forced to change vacation plans for which part or full payment has already been made (J.A. 55-56), "preponderate on the side of enforcing the law" (J.A.73). It also stated that (id.)

> the court is not convinced that an injunction against violation of the regulations will put any defendant out of business. On the contrary, clarification of the defendants' obligations by an injunction may well protect them against hasty cancellation of flights by airlines which are fearful of penalties for violating the affinity charter regulations.

Finally, noting inter alia that "[t]he Court of Appeals in the Aeromatic case described the activities charged here as being similar to those which were enjoined in the Monarch case" (J.A. 75) and that "[a] wholesaler who steps between the carrier, the travel agent and the charterer is acting in concert and should be required not to violate the affinity charter rules. It

seems clear from the entire record that all the defendants are aware of the provisions of the affinity charter regulations. Travel agencies which participate with a carrier may also be enjoined if operations violate the law" (J.A. 76, citation omitted), the court determined to enter injunctive relief against the defendants. It described this relief as follows (J.A. 82-83):

> The type of advertising utilized by most of the defendants offers a temptation to retail travel agents to sell package tours on affinity charter flights to ineligible individuals.
>
> An appropriate corrective step is to enjoin the use of existing materials, and require the withdrawal of all existing flyers or descriptions of tours by the defendants mentioned above within twenty days after the Order to be entered, and to enjoin them from using any other publicity material which does not state (1) in readable print that the circular and the tour are intended only for persons who have been bona fide members of a chartering organization for six months or members of an authorized group of 40 persons and also (2) that the air travel portion of the tour price is subject to change if there are empty seats on the plane so that the cost can be pro-rated among the members of the chartering organization.
>
> If there is an intermediary between the chartering agent and the air carrier other than the travel agent of record, then each intermediary should be required to execute a warranty similar to that in Part A of Section II of the S.S.I. and affix it to the S.S.I. in the form of an allonge. The travel agent of record should be responsible for seeing that the

> intermediaries execute such a warranty and for checking the charterer's section of the S.S.I., to ascertain that it does in fact indicate compliance with the affinity charter regulations. (The travel agent of record should know what intermediaries there are and who is the charterer).
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> * * * * *

The court decreed that the injunction be directed specifically against all named appellants, among other defendants (J.A. 84).

In accordance with its opinion, the court entered a preliminary injunction on October 9, 1974, which, as amended October 15, 1974, prohibits appellants (among other defendants) from, inter alia: (1) failing to withdraw from use or circulation all existing publicity material, and from using any publicity material, involving affinity charter air transportation which does not comply with the requirements of the CAB regulations; and (2) directly or indirectly participating in the arrangement or sale of affinity charter air transportation except: (a) as an authorized agent of a direct air carrier (and therefore as a travel agent as defined in the regulations), in which event it must execute the Statement of Supporting Information (SSI) required by the regulations, assure that the chartering organization has complied with the regulations and has executed an SSI, and assure that any other

intermediary has executed a warranty specifying that it has acted in compliance with the regulations (warranty of intermediary); or (b) as an intermediary, provided it executes the warranty of intermediary and assures that every other intermediary involved in arranging the charter flights executes such warranty (J.A. 85-91).[16/]

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act, 49 U.S.C. 1301 et seq., and the regulations promulgated thereunder by the Board, are set forth in an Addendum to this brief.

16/ The district court stayed the entry of the preliminary injunction to permit defendants-appellants to seek a stay pending appeal from this Court. On November 6, 1974 this Court granted defendants-appellants' motion for a partial stay pending appeal. The Court, on December 2, 1974, denied the Board's motion for rehearing of the stay, but it ordered that the appeal be expedited and set for argument the week of January 6, 1975.

ARGUMENT

This case was in the district court for four months on the Board's request for preliminary injunctive relief.[17] During that time the Board was required to build an extensive evidentiary record, consisting of detailed affidavits, exhibits, and live testimony, plainly demonstrating that appellants (among other defendants) are participating in a vast, highly profitable black market in affinity charter air transportation, which threatens to undermine the regularly scheduled, individually ticketed service provided by trunkline air carriers which is crucial to this Nation's economy. The district court issued the preliminary injunction because it made factual findings from this record, not shown to be clearly erroneous, that appellants' activities violated the Federal Aviation Act and the affinity charter regulations, and because it concluded that "the public interest factors . . . preponderate on the side of enforcement of the law" (J.A. 73). We shall show that the temporary relief granted by the district court was an appropriate response by a court of equity to appellants' continuing illegal operations, and that in view of the likelihood of the Board's ultimate success on the merits and the public

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17/ This long delay has prevented the Board from obtaining the "swift remedy afforded it" by 49 U.S.C. 1487(a). Civil Aeronautics Board v. Modern Air Transport, 179 F. 2d 622, 626 (C.A. 2, 1950).

interest factors involved, its issuance was well within the court's discretion. We shall also show that there were no procedural errors committed below which would warrant the revocation of the relief granted.

I.

THE ISSUANCE OF THE PRELIMINARY INJUNCTION WAS WELL WITHIN THE DISCRETION OF THE DISTRICT COURT.

The grant of preliminary injunctive relief will not be disturbed on review unless the district court abused its discretion or ignored some fundamental principle of equity. Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1941); Packard Instrument Co. v. Ans, Inc., 416 F. 2d 943, 945 (C.A. 2, 1969). Since the Board's suit for injunctive relief is expressly authorized by statute, 49 U.S.C. 1487(a), it was legally required to demonstrate only a reasonable certainty of success on the merits, and not irreparable injury, to be eligible for the discretionary award of that relief. Civil Aeronautics Board v. Modern Air Transport, 81 F. Supp. 803, 806 (S.D.N.Y. 1949), affirmed, 179 F. 2d 622 (C.A. 2, 1950). See Long Island R. Co. v. New York Central R. Co., 185 F. Supp. 673, 677 (E.D.N.Y.), affirmed, 281 F. 2d 379 (C.A. 2, 1960). On the basis of the extensive record developed by the Board, it is clear that the district court did not abuse

its discretion in estimating the likelihood of the Board's ultimate success in this case, and the temporary injunction which issued was fully warranted.

1. The Activities of Appellants.

As already noted, supra p. 4, the Act defines an "air carrier" as anyone "who undertakes, whether directly or indirectly by a lease or any other arrangement, to engage in air transportation". 49 U.S.C. 1301(3). A direct air carrier may be viewed as a trunkline or supplemental airline which operates aircraft. An indirect air carrier is anyone else who "engage[s] in air transportation" whether "by a lease or any other arrangement". The Board has determined that "a person not directly engaged in the operation of aircraft is an indirect air carrier if such person sells transportation by aircraft to the general public other than as an authorized agent of a direct carrier in the consummation of transportation arrangements between the operator of the aircraft and the passengers." Hacienda Hotels - U.S. Aircoach, Enforcement Proceeding, 26 C.A.B. 372, 385 (1958).[18/]

The record establishes unequivocally that appellants "engage in air transportation", at least indirectly, As the district court found, Carefree/Vacation Ventures contracted directly with Overseas National Airways for air transportation,

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18/ Hacienda has been cited with approval by the courts. E.g., Civil Aeronautics Board v. Aeromatic Travel Corp., 489 F. 2d 251, 254 n.9 (C.A. 2, 1974); Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F. 2d 552, 554 (C.A. 9, 1972), certiorari denied, 410 U.S. 967 (1973).

and advertised and sold this transportation to affinity charter groups and individual members of the general public, including an undercover CAB agent (J.A. 43-45, 68-69). The sale of this air transportation to the general public is at a price fixed by Carefree/Vacation Ventures, and it is facilitated by its preparation of bogus affinity-group membership certificates for its customers (J.A. 45). These findings, set forth by the district court as grounds for its grant of preliminary injunctive relief, "shall not be set aside unless clearly erroneous", Rule 52(a), Fed. R. Civ. P., and although appellants make a weak attempt to dispute the findings (Brief for Appellants, pp. 32-33), they make no attempt to show that they are "clearly erroneous". Therefore the district court's conclusion that Carefree/Vacation Ventures "was indirectly undertaking to engage in air transportation 'by a lease or any other arrangement'" (J.A. 69) is plainly correct, and since Carefree/Vacation Ventures doe not have a certifice of public convenience and necessity it is an unauthorized carrier under 49 U.S.C. 1371(a), and it has also violated its duty imposed by 49 U.S.C. 1485(e) to comply with the affinity charter regulations.

The findings with respect to Pike and Surrey are virtually the same. Together they reserve bulk air transportation which they sell to affinity groups and individuals through retail travel agencies at a price fixed by Pike (J.A. 50-51). Pike has assumed responsibility for arranging alternative transportation when needed for those who buy this transportation (J.A. 51).

Pike and Surrey facilitate these sales by preparing bogus affinity-group membership certificates for those who purchase their transportation and signing charter contracts directly with carriers in the name of chartering groups without authorization (J.A. 18). Appellants have not shown these findings to be "clearly erroneous" (Brief for Appellants, pp. 33-35), and the findings support the conclusion that Pike and Surrey are undertaking to "engage in air transportation" by a "lease or any other arrangement". Since they do not have a certificate of public convenience and necessity, they are unauthorized carriers under 49 U.S.C. 1371(a) and have violated their duty imposed by 49 U.S.C. 1485(e) to comply with the affinity charter regulations.[19/]

19/ Unlike Carefree/Vacation Ventures, Pike and Surrey are distinct corporate entities whose joint activities have resulted in violations of the Act and the affinity charter regulations. The courts have consistently upheld determinations by the Board that unauthorized air transportation as prohibited by 49 U.S.C. 1371(a) may be achieved as a result of a combination or joint enterprise of several participating corporations and individuals irrespective of whether each participant in isolation may be deemed to have violated that provision. E.g., North American Airlines v. Civil Aeronautics Board, 240 F. 2d 867 (C.A.D.C., 1956), certiorari denied, 353 U.S. 941 (1957).

That the activities of appellants make them indirect air carriers is supported by judicial precedent.[20/] In Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F. 2d 552, 553-554 (C.A. 9, 1972), certiorari denied, 410 U.S. 967 (1973), the court of appeals characterized the defendant in terms directly applicable to appellants:

> "Although ACCI is nominally a social club, its real business is selling to the general public tours and air transportation between Southern California and Europe, on aircraft it charters. It hires planes from direct air carriers, solicits members of the general public to purchase tickets on the flights it arranges, and consolidates groups of passengers to fill the space it purchases. ACCI does not strictly enforce the rule that passengers on its flights be members of ACCI for six months prior to the flights. ACCI makes a substantial profit derived from the excess of the price of the tickets it sells over its cost in hiring the aircraft. The price of tickets on ACCI flights is less than the legal tariff for nonchartered flights. ACCI is not an agent for airlines nor for its customers; it is an entrepreneur. It has no certificate of public convenience and necessity from the Civil Aeronautics Board or any exemption from the provisions of the Federal Aviation Act authorizing it to engage in air transportation.
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> * * * * *

20/ It is possible, though extremely unlikely, that appellants will be able to demonstrate that they have acted as "authorized agent[s]" of direct air carriers with respect to the conduct of which the Board complains. However, if they demonstrate the existence of an "authorized" agency relationship, they would still be subject to an injunction prohibiting the activities alleged in the complaint. For in that event appellants would be acting as authorized agents of direct air carriers who are violating affinity charter regulations, and the Board would be entitled to enjoin those agents, and their principals, from continuing to so act. See 49 U.S.C. 1485(e), 1487, and World Airways, Inc. v. Northeast Airlines, Inc., 349 F. 2d 1007, 1010 (C.A. 1, 1965), certiorari denied, 382 U.S. 984 (1966).

> When an organization arranging charter flights operates very much like a carrier, it should be treated as a carrier, regardless of the labels it applies to its business or the existence of incidental features of its program not shared by ordinary carriers. (Educational Student Exchange Program, Inc. (1971) . . . . . CAB . . . . . (Order 71-5-39); United European American Club (1971) . . . . . CAB . . . . . (Order 71-2-33); cf. Las Vegas Hacienda, Inc. v. C.A.B. (9th Cir., 1962) 298 F. 2d 430; American Airlines v. C.A.B. (7th Cir., 1949) 178 F. 2d 903; Hacienda Hotels-U.S. Aircoach, Enforcement Proceeding (1968) 26 CAB 372).
>
> ACCI was in the transportation business thinly disguised as a club. The district Court correctly decided that it was an indirect carrier."

See also M. & R. Investment Co., Inc. v. Civil Aeronautics Board, 308 F. 2d 49 (C.A. 9, 1962); Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 298 F. 2d 430 (C.A. 9, 1962); Travel Agents Malpractice Action Group v. Regal Cultural Society, 118 N.J. Super. 184, 287 A. 2d 4 (1972).

In sum, there is ample support for the district court's prediction that the Board will succeed on the merits of this case.

2. The Equitable Principles

Quite apart from the likelihood of the Board's ultimate success on the merits, the issuance of the preliminary injunction was an appropriate response by a court of equity to the creation by the appellants and others of a vast black market in charter air transportation.

"Individually ticketed, regularly scheduled service is the mainstay of an efficient air transportation system, and a critical necessity in any sophisticated economy." Saturn Airways, Inc. v. Civil Aeronautics Board, 483 F. 2d 1284, 1287-1288 (C.A.D.C., 1973). The existence of a large black market that is not exposed to the "economic rigors attendant upon a regularly scheduled, individually ticketed service" (483 F. 2d at 1287) is inconsistent with "[t]he promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations . . . or unfair or destructive competitive practices" (49 U.S.C. 1302(c)). The precarious financial condition of certain scheduled carriers is not without significance in this regard. Additionally, the activities of appellants and others generate pressures to act unlawfully on persons in the air transportation industry who would prefer to provide their customers with lawful tours or travel packages, confronting them with the choice of economic injury or entering the black market themselves. In short, there is a strong public interest in

ensuring that the regulated air transportation industry operates in practice in a manner consistent with the regulatory scheme administered by the Board. The preliminary injunction issued below serves that interest by putting an end, at least temporarily, to unlawful activities which threaten to disrupt the industry.

What appellants and the other defendants have done is to illegally interject themselves into the regulatory scheme. As the district court pointed out, appellants seek to "permit widespread evasion of the C.A.B. charter flight regulations by creating a no-man's land where defendants neither require certificates of convenience and necessity nor can be required to abide by the regulations" (J.A. 77). It is wholly proper that the response of the district court, sitting in equity, to this evasion of the regulatory scheme has been to require that appellants substantially abide by its requirements. 21/ The fact that this may deprive appellants of substantial revenue illegally secured is a reason for affirming it, not for revoking it, as appellants contend (Brief for Appellants, pp. 28-29). Nor should the speculative losses appellants conjure up for airlines, hotels, and others, or the possible temporary disruption of passenger travel plans, defeat the

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21/ In large part the injunction requires appellants to execute a document patterned on the "Statement of Supporting Information" and warrant compliance with the Act and the regulations.

grant of injunctive relief. As the district court concluded, "the public interest factors ... preponderate on the side of enforcing the law" (J.A. 73).

Appellants complain that portions of the injunction are unduly burdensome or vague (Brief for Appellants, pp. 24-26). But the district court recognized that in arranging affinity charter flights appellants are in a position to know all those involved and to ensure that the chartering organization is bona fide and in compliance with the regulations, that only bona fide members are ticketed, that the cost of the tickets has been pro-rated, and that all intermediaries involved have executed the necessary warranties. Appellants may apply to the district court for clarification of any portions of the injunction they do not understand.

Finally, appellants assert they have inaugurated efforts to comply with the Act and the regulations, so that they need not be enjoined (Brief for Appellants, pp. 29-30). However, as the district court held (J.A. 79), appellants "have not met the burden of showing that the court should exercise its discretion to deny a preliminary injunction because of their corrective efforts". The district court was clearly warranted in finding that "[t]here is still enough possibility of future violations to require court intervention" (J.A. 78), and its issuance of injunctive relief was not an abuse of discretion.

§ 1301. Definitions ... context otherwise requires—

3. The Constitutional and Statutory Attacks

Appellants believe they could successfully defend this suit on the merits by arguing that the affinity charter regulations violate equal protection concepts embedded in the Due Process Clause and the anti-discrimination provision of the Federal Aviation Act, and that they therefore may not be enforced (Brief for Appellants, pp. 7-14). But since appellants lack standing to raise these arguments, and since the arguments inherently lack merit, the district court properly discounted them in evaluating the parties' relative prospects of ultimate success.

Appellants contend that in carrying out its admitted "responsibility of distinguishing between individually ticketed service and charter air transportation" the Board "unjustly discriminates against the traveling public" by fashioning affinity charter regulations which "accord a particular classification of traffic a preference because of its identity or status" (Brief for Appellants, pp. 13, 8). Appellants would redress this injury allegedly suffered by some segments of the "traveling public" by helping them circumvent the requirements of the regulations, or, as appellants euphemistically phrase it, by "being more egalitarian" in their business practices and "allowing ordinary citizens to participate in affinity charters" (Brief for Appellants, p. 8).

However, appellants do not claim to be members of the allegedly injured segment of the "traveling public". Thus they do not claim to be members of the class of persons whose constitutional and statutory rights they seek to assert. It is well settled that those who challenge the constitutionality or legality of statutes or regulations have standing to raise the challenge in federal court only if they belong to the class of persons allegedly injured by the asserted unconstitutionality or illegality. O'Shea v. Littleton, 414 U.S. 488, 493-496 (1974). Where, as here, the challengers do not claim injury from the alleged unconstitutionality or illegality, they have no standing to raise those issues. Schlesinger v. Reservists Committee to Stop the War, 42 U.S.L.W. 5088 (U.S. , June 25, 1974) (No. 72-1188). See Arnett v. Kennedy, 416 U.S. 134, 163-164 (1974); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 428-431 (1974).

Even if appellants had standing to raise their constitutional and statutory arguments, the arguments are plainly without merit. Appellants concede, as they must, that the Board is empowered by Congress to distinguish between regularly scheduled, individually ticketed service and charter air transportation (Brief for Appellants, p. 13). In addition, appellants recognize that the Board has adopted regulations, apart from the affinity charter regulations, which make charter air transportation available to every segment of the traveling public, without regard to membership in "affinity"

groups (Id.). See 14 C.F.R. Part 372a ("Travel Group Charters") and Part 378 ("Inclusive Tour Charters"). Appellants' argument boils down to the claim that the "attractiveness" of the different types of authorized charters varies, and that because the affinity charter regulations make affinity charters much more attractive then other types of charters, they should be struck as unconstitutional and illegal because affinity charters are available only to members of affinity groups (Brief for Appellants, p. 14). In effect, appellants argue that the Board is constitutionally bound to make charter air transportation available for individual purchase without regard to prior affinity.

The affinity requirement is reasonable, however, because it serves to prevent the catastrophic degree of diversion from regular fares which would occur if low-fare groups could be freely formed from unaffiliated, individual members of the general public. National Air Carrier Association v. Civil Aeronautics Board, 442 F. 2d 862, 873 (C.A.D.C., 1971). The Supreme Court has repeatedly held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

mathematical nicety or because in practice it results in some inequality.'" Dandridge v. Williams, 397 U.S. 471, 485 (1970). And "a classification that meets the test articulated in Dandridge is perforce consistent with the due process requirement of the Fifth Amendment." Richardson v. Belcher, 404 U.S. 78, 81 (1971). Since the distinctions created by the affinity principle are rationally based, they are not unconstitutional. As Chief Justice (then Judge) Burger has written:

> A prime concern of Congress was to maintain the integrity of the charter concept -- to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions.
>
> American Airlines v. Civil Aeronautics 348 F. 2d 349, 354 (C.A.D.C., 1965).

As for the statutory challenge, suffice it to say that the validity of the affinity principle has been consistently upheld against the contention that it causes unjust discrimination in violation of the Act. National Air Carrier Association v. Civil Aeronautics Board, 442 F. 2d 862, 873-874 (C.A.D.C., 1971); IATA Transatlantic Fares Agreement, _____C.A.B. _____, Order 70-2-123, pp. 9-10 (February 27, 1970) (Add. 72a); IATA Group Fares Agreement, 36 C.A.B. 33, 40-41 (1962).

Since the Board is charged with the responsibility of enforcing the anti-discrimination provisions of the Federal Aviation Act, its interpretation of those provisions is entitled to great weight and "should be followed unless there are compelling indications that it is wrong". Red Lion Boardcasting Co., v. Federal Communications Commission, 395 U.S. 367, 381 (1969).

The fact that the Board has proposed phasing out the affinity charter regulations by the end of 1975 neither relieves appellants of their duty to comply with them while they remain in effect nor deprives the Board of its statutory right and duty to have them enforced by the district court upon a proper showing. 22/ Nor are the affinity charter regulations rendered unenforceable because the Board has given as a reason for their proposed elimination that they "inherently tend to be discriminatory". In expressing this policy view, which it has frequently expressed

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22/ In Civil Aeronautics Board v. Aeromatic Travel Corp., 349 F. Supp. 1151 (E.D. N.Y. 1972), the district court, in refusing to enjoin defendant travel agencies from violating the affinity charter regulations and remanding the case to the Board, relied in part on a similar Board order instituting an investigation to determine whether the affinity rules should remain in effect during the pendency of experimental travel group charter regulations (id. at 1157, n.20). In reversing the district court this Court stated that "[t]here is no reason why both the factual and legal issues cannot be decided by the district court without delay." 489 F. 2d at 254.

as it has sought to improve the charter regulations through continual revision, the Board is declaring only that the affinity charter rules are an imperfect means to a necessary end and not that they are unjustly discriminatory within the meaning of the Act, 49 U.S.C. 1374(b). See Trailways of New England, Inc. v. Civil Aeronautics Board, 412 F. 2d 926 (C.A. 1, 1969); Transcontinental Bus System, Inc. v. Civil Aeronautics Board, 383 F. 2d 466 (C.A. 5, 1967). As the court below stated (J.A. 65):

> The discriminatory nature of affinity charters, as asserted by defendants, is not a ground for denying an injunction. In fact, defendants' position is not advanced by the C.A.B. statement which they quote. The C.A.B. stated in a release announcing new regulations that existing charter rules "tended to discriminate against members of the public who did not belong to qualified organizations with a membership large enough to successfully mount a charter program." APR-61, Sept. 27, 1973. The C.A.B. then undertook to cure this discrimination by providing travel group charter rules, so that any group of 40 can now obtain charter rates.

II.

THE DISTRICT COURT DID NOT COMMIT ANY PROCEDURAL ERRORS WHICH WOULD WARRANT REVOCATION OF THE PRELIMINARY INJUNCTION.

Appellants argue that the district court erred in referring this case for a hearing and report to the United States Magistrate, in permitting the "intentional misjoinder of appellants", and in sanctioning "judge shopping" by the Board (Brief for Appellants, pp. 36-45). These arguments are entirely without merit and provide no basis for upsetting the grant of temporary injunctive relief.

The principal objection to the reference to the Magistrate was made by the Board. None of the appellants objected to the reference. Indeed, it may be assumed that appellants were quite content with the reference since the Magistrate did not recommend in favor of issuing a preliminary injunction. Having waived objection to the reference below, appellants should not be heard to complain now simply because the ultimate decision went against them. As Chief Justice (then Judge) Burger has stated:

> It is imperative to an efficient and fair administration of justice that a litigant may not withhold his objections, await the outcome, and then complain that he was denied his rights if he does not approve the resulting decision.
>
> Brotherhood of Rail Trainmen v. Chicago, Milwaukee, etc. R. Co., 380 F. 2d 605, 608-609 (C.A.D.C.), certiorari denied, 389 U.S. 928 (1967).

Cf. United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952). There is no reason to depart from the general rule that issues not raised in the district court by an appealing party may not be raised for the first time on appeal. See Green v. Brown, 398 F. 2d 1006, 1007 (C.A. 2, 1968).

While, as we noted above, we objected to the reference to the Magistrate, it is now readily apparent that the error was harmless. As the district court stated, "The time schedule which the court set for the Magistrate to submit his report was insufficient to permit him to analyze the evidence other than individual sales to Mr. Minichiello by various defendants. The Magistrate found that most of the defendants had violated the regulations, but that the violations were not proved to be so systematic as to justify an injunction. Evidence on which he did not pass showed systematic violations, however" (J.A. 65-66) (emphasis added). Thus the key findings below, upon which the district court based its award of injunctive relief, were made by Judge Judd. Any doubts about whether this case was adequately considered and decided by Judge Judd, rather than the Magistrate, may be quickly dispelled by a perusal of the extensive memorandum decision.

Next, the district court properly denied appellants' motions to dismiss the complaint for alleged misjoinder. As the court pointed out, "[h]ere the same witness supplied information concerning several defendants. The development of the evidence has shown business relations among most of

the defendants. At the present stage, there are only five groups of defendants involved in the motion for a preliminary injunction, and four of them are represented by the same attorney" (J.A. 59-60). The court did not abuse its discretion in granting injunctive relief in the face of the baseless claim of misjoinder.

Finally, appellants contention that the Board engaged in "judge shopping" is patently frivolous. As required by the local rules of the district court, the Board informed the district court upon the filing of its complaint that this case was related to Civil Aeronautics Board v. Aeromatic Travel Corp., supra. As this Court is aware, Aeromatic Travel involves issues substantially identical to those presented here, namely, unauthorized operations by indirect air carriers in the affinity charter market and violations of the affinity charter regulations. At the time this suit was commenced Aeromatic was pending before Judge Judd to whom it had been randomly assigned on remand from this Court. It makes good administrative sense that, uncer the rules of the district court, this case, too, was assigned to Judge Judd. Appellants apparently believe they have some legal right not to have a particular judge assigned to this case. As the district court held, appellants are entirely mistaken (J.A. 61).

There has been no showing that the district court abused its discretion or violated any principle of equity in granting the Board temporary injunctive relief, relief which the court admitted was less than what the Board requested (J.A. 29). That being the case, this Court should permit the injunction to stand so that the Board may obtain on behalf of the public the "speedy remedy provided it" by 42 U.S.C. 1487(a).[23/]

CONCLUSION

For the foregoing reasons plaintiff-appellee respectfully requests that the Court affirm the preliminary injunction issued below.

Respectfully submitted,

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23/ Civil Aeronautics Board v. Modern Air Transport, 179 F. 2d 622, 626 (C.A. 2, 1950), quoted in Civil Aeronautics Board v. Aeromatic Travel Corp., 489 F. 2d 251, 254 (C.A. 2, 1974).

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 1974, I served the foregoing Brief for Plaintiff-Appellee and Addendum upon counsel by causing copies to be mailed, postage prepaid, to:

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